

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA07-1190

COURTNEY MITCHELL and TERESA
MARKIN

APPELLANTS

V.

JOHN RAMSEY, TRI-STATE DELTA
CHEMICALS, INC., d/b/a UNITED
AGRI PRODUCTS, MID-SOUTH

APPELLEES

Opinion Delivered SEPTEMBER 17, 2008

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[NO. CV02-384]

HONORABLE VICTOR HILL,
JUDGE

DISMISSED

ROBERT J. GLADWIN, Judge

Appellants Courtney L. Mitchell and Teresa Markin, individually and in their representative capacities as administrators of the estate of Tyson Massengill, appeal the August 13, 2007 order of the Crittenden County Circuit Court wherein the trial court granted the summary judgment motion of appellees John Ramsey and Tri-State Delta Chemicals, Inc., d/b/a United Agri Products, Mid-South (UAP). The trial court found appellants' claim of negligence against Ramsey inconsistent with appellants' claim against the manufacturer, which had been settled previously. The issue presented on appeal is whether the trial court erred in granting summary judgment. However, while none of the parties raise this issue, the question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise sua sponte. See *Jones v. Huckabee*, 363 Ark. 239, 213 S.W.3d 11 (2005). Accordingly, we

must dismiss the appeal pursuant to Arkansas Rule of Civil Procedure 54(b), as the summary judgment order is not a final order, and we do not have jurisdiction to reach the merits of the appeal.

In this wrongful death and survival action, appellants filed suit against appellees and others contending that appellees' negligence caused the death of decedent, Tyson Massengill. Massengill was killed when the pick-up truck he was driving was struck by the arm of a field sprayer driven by appellee Ramsey, who was employed by appellee UAP. In their second-amended complaint filed April 14, 2005, appellants claimed that Ramsey was negligent by operating the vehicle in a careless manner as evidenced by a failure to keep a proper lookout and failure to maintain proper control; that he operated the vehicle at an unreasonable speed in light of conditions, without a proper escort, without the requisite safety precautions for its width, without the required lamp or flag marker, and without the required lamps; and that he operated an oversized vehicle and unsafe vehicle in violation of the Arkansas Code.

Appellants also sued Case Corporation, which manufactured the field sprayer, and Gemini Enterprises, Inc., which leased the field sprayer to appellees. Appellants claimed the field sprayer was defective because the arm on the sprayer came down while the sprayer was in transit. Appellant's second amended complaint states in pertinent part as follows:

22. The collision between the two vehicles occurred in the Plaintiff's lane of traffic when the extended boom on the [C]ase field sprayer crushed the lower portion of the roof of the cab on the driver[']s side of Tyson Massengill's vehicle, killing Tyson Massengill. The boom either was left down by the operator, John Ramsey, or came down improperly.

. . . .

38. . . . The boom came down because of the defective and unreasonably dangerous design defects of the lessor, Gemini Enterprises, Inc.

. . . .
44. . . . The boom came down because of the defective and unreasonably dangerous design defects of the manufacturer, Case Corporation.

Appellees Ramsey and UAP filed a third-party complaint against Case Corporation for contribution, should appellees be held liable. Before trial, appellants settled their claims against Case Corporation and Gemini Enterprises. However, the third-party complaint was not dismissed.

Appellees filed a motion for summary judgment, arguing that because appellants had alleged that the field sprayer was defective, and that the defect was the cause of the arm of the field sprayer deploying while it was in transit, appellants could not take the alternative position that appellee Ramsey was negligent in failing to stow the arm of the field sprayer before moving up the highway. Appellees also argued that appellants' claims regarding appellees' negligence in failing to register the field sprayer should be summarily dismissed because no proximate cause could be proven. Finally, appellees argued that there was no evidence before the court that warranted imposition of punitive damages. Appellants responded by claiming that the doctrine of inconsistent positions did not apply because they pled alternatively; that appellees' violation of the law was a proximate cause of appellants' damages; and that the evidence warrants the submission of punitive damages to the jury.

The trial court granted appellees' motion for summary judgment by order filed August 13, 2007, which states in pertinent part as follows:

Disposing of point 2 first. Whether a permit was required is a fact question for the finder of fact to determine. It would not be appropriate to make a determination by way of summary judgment whether or not a permit was required. The court notes that there was not even agreement at the hearing about the width of the vehicle. Going on

to point 3, the court is of the opinion that this would not be a proper case for punitive damages.

. . . .

In the instant case, the plaintiffs maintained that a design defect was the cause of the accident. Their expert witness stated that the design defect was the sole cause of the accident. The plaintiffs settled their case with Case Corporation based upon that position. Now, with that defendant out of the way, they would assert a claim for negligence, enlisting to their campaign a Case employee apparently prepared to testify that there was no design defect, and that negligence of the operator was the sole cause of the accident.

There are appropriate venues for that kind of chutzpah, but an Arkansas court is not one of them. Whether it be by judicial estoppel or the application of the doctrine against inconsistent positions, the inconsistent claim of negligence cannot stand. The defendants' motion for summary judgment is hereby granted.

Appellants filed a timely notice of appeal, and this appeal followed.

Arkansas Rule of Civil Procedure 54(b)

Arkansas Rule of Civil Procedure 54(b), states in pertinent part as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute the following certificate, which shall appear immediately after the court's signature on the judgment, and which shall set forth the factual findings upon which the determination to enter the judgment as final is based[.]

Rule 54(b) provides that an order or judgment is not considered final and appealable if it adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties involved in a cause of action. *McKinney v. Bishop*, 369 Ark. 191, 252 S.W.3d 123 (2007).

When an order or judgment is not final and appealable, the appellate courts do not have jurisdiction to hear the matter. *Id*; *Kinkhead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997).

Appellees' motion for summary judgment asked for dismissal of three distinct claims: 1) negligence regarding the arm or boom; 2) negligence regarding registration of the field sprayer and other statutory requirements; 3) punitive damages. The trial court's order granted summary judgment, but based its decision on either judicial estoppel or the application of the doctrine against inconsistent positions, which is applicable only to the negligence claim regarding the arm or boom. The trial court's finding, that whether a permit was required is a fact question for the finder of fact to determine, necessarily negates summary judgment as to the negligence claim regarding registration of the field sprayer. However, in its concluding paragraph, the trial court did not state that it was granting summary judgment as to all but one claim. Instead, the court merely stated that summary judgment was granted. Thus, it is unclear whether the court dismissed all of the claims or only two of the three claims. If the order disposed of only two of the claims, the order is not final and therefore not appealable without a Rule 54(b) Certificate.

Further, the court did not dispose of appellees' third-party complaint against Case Corporation. Appellees filed the complaint on September 2, 2003, arguing that should appellees be held liable in any manner, appellees are entitled to contribution from Case Corporation. Further, the complaint alleges that Case Corporation breached the warranties of fitness and merchantability and violated the Arkansas Products Liability Act of 1979 in supplying the equipment. When appellants settled out of court with Case Corporation, a consent order was filed August 6, 2007, dismissing appellants' claims against Case Corporation. This order was signed by attorneys for appellants and Case Corporation. However, this order

did not include the claims remaining against Case Corporation in the third-party complaint. The order granting summary judgment likewise did not include any mention of the third-party complaint. Also, the summary-judgment order did not contain a Rule 54(b) Certificate allowing for an immediate appeal.

Accordingly, we hold that the summary-judgment order lacked finality because it left issues outstanding. In *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 360 Ark. 521, 202 S.W.3d 532 (2005) (per curiam), the supreme court held that a notice of appeal filed from an order that lacked finality was a nullity and that any appeal brought from a non-final order is subject to dismissal. Therefore, any attempt to appeal from the summary judgment in the present case would have been a nullity. Accordingly, this case is dismissed.

Dismissed.

ROBBINS and BIRD, JJ., agree.